ENABLING THE FEDERAL RULES

DEBRA LYN BASSETT†

This Article, written for a symposium concerning the U.S. Supreme Court's decision in Shady Grove Orthopedic Associates v. Allstate Insurance Co., presents a hypothetical alternative concurring opinion in the case. Although agreeing with Shady Grove's ultimate result, this concurrence takes a different approach from that of the actual concurring opinion authored by Justice Stevens. Offering a more comprehensive historical background to develop a clarified analytical framework, this Article proposes a unifying approach consistent with the Court's prior decisions that would better serve the purposes underlying the Rules Enabling Act by examining Federal Rules for compliance with the Act at only one point in time: the time of the Rule's promulgation.

INTRODUCTION

The Creighton Law Review invited me to “re-write the [plurality], concurring, or dissenting opinion [in] Shady Grove Orthopedic Associates v. Allstate Insurance Co.,[1] as you think it should have been written.”2 Shady Grove examined whether a federal diversity class action seeking statutory interest could move forward in the federal court, or whether a New York state law prohibiting the recovery of a penalty in class actions (such as the statutory interest sought) prevented the class action pursuant to the Erie doctrine. The basic premise underlying the Erie doctrine, of course, is that federal courts hearing a state law claim follow state substantive law, but have the power, pursuant to the Rules Enabling Act, to create federal procedural rules. The federal district court concluded that the New York law precluded the class action,3 and the Second Circuit affirmed.4 The Second Circuit concluded that the New York provision was substantive and thus the federal court was required to apply the state provision. This conclu-

† Justice Marshall F. McComb Professor of Law, Southwestern Law School. Many thanks to Patrick Borchers, Ralph Whitten, and the Creighton Law Review for inviting me to participate in this Symposium, to Rex Perschbacher for his comments on an earlier draft, and to Dean Bryant Garth for his encouragement and research support.

1. 130 S. Ct. 1431 (2010).
sion meant that the lawsuit could not proceed as a class action. The Supreme Court reversed, holding that the New York provision conflicted with the federal procedural law governing the maintenance of class actions—namely, Federal Rule of Civil Procedure 23—and because the federal courts apply federal procedural law, the New York provision did not apply. Justice John Paul Stevens’s concurrence agreed that Rule 23 rather than the New York law applied, but argued that in some instances, federal procedural law could be displaced by a state procedural law that “is so intertwined with a state right or remedy that it functions to define the scope of the state-created right”—a situation that Justice Stevens did not find to exist in Shady Grove. A spirited dissent, authored by Justice Ruth Bader Ginsburg, would have found no direct conflict between Rule 23 and the New York provision, thus applying the New York provision and thereby preventing the class action.

I have chosen to offer a hypothetical alternative concurring, rather than plurality, opinion because I believe the plurality’s conclusion is correct, but I want to emphasize a different point—that examining a Federal Rule for compliance with the Rules Enabling Act at the time of the Rule’s promulgation is both consistent with the Court’s prior decisions and would better serve the Act’s purposes.

THE ALTERNATIVE CONCURRENCE

JUSTICE BASSETT, concurring in part and concurring in the judgment.

I agree with the plurality that Federal Rule of Civil Procedure 23 governs this case. However, because our decisions touching on Erie and its progeny have not always been clear, and because such issues still inspire confusion, I write separately to offer a more detailed historical analytical framework and some additional points of clarification.

I.

At its core, the Erie doctrine is an attempt within our federal system to honor two potentially competing congressional statutes: the Rules of Decision Act and the Rules Enabling Act. The Rules of De-

5. Of course, because of the Supremacy Clause, our federal system honors and prefers federal legislation in the operation of the federal system and in the rules of decision governing cases heard in the federal courts. Congress, however, can and occasionally has enacted legislation directing the federal courts to follow state rules of decision. One of these acts is the Rules of Decision Act. 28 U.S.C. § 1652 (2006).
cision Act provides that "[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." In short, this means that when a federal court hears a state law based claim—whether due to diversity jurisdiction, supplemental jurisdiction, or certain rare types of arising-under jurisdiction—the applicable state substantive law governs that state law based claim.

The Rules Enabling Act provides, in pertinent part: "(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . and courts of appeals. (b) Such rules shall not abridge, enlarge or modify any substantive right." Congress has thereby accorded the Supreme Court the power to create procedural rules for the federal courts, and we exercised that power in promulgating the Federal Rules of Civil Procedure. In fact, 1938 gave us both the Federal Rules of Civil Procedure and the Erie decision.

If there were a bright line between matters of substantive law and matters of procedural law, then the two statutes—the Rules of Decision Act and Rules Enabling Act—would coexist without any difficulty. However, because no such bright line exists, we have the elaborations and permutations of the Erie doctrine.

A.

_Erie Railroad Co. v. Tompkins_13 concerned the Rules of Decision Act; in _Erie_, we overruled _Swift v. Tyson_14 to include state case law within the state substantive law that federal courts must apply to state law based claims. _Erie_ did not anticipate or resolve all questions pertaining to the applicable law in diversity cases, however, and our subsequent decisions in _Guaranty Trust Co. of New York v. York_16 and _Byrd v. Blue Ridge Rural Electric Cooperative, Inc._17 followed.18

---

13. 304 U.S. 64 (1938).
14. 41 U.S. 1 (1842).
15. _Erie R.R. Co. v. Tompkins_, 304 U.S. 64, 72-80 (1938); _Swift v. Tyson_, 41 U.S. 1 (1842).
In *York*, in which the issue was whether to apply the state statute of limitations or the federal equitable doctrine of laches, we acknowledged that the substantive versus procedural distinction offered as guidance in *Erie* was not always clear.\(^{19}\) *York*'s statute of limitations issue illustrated the problem: on the one hand, a statute of limitations would appear procedural, constituting a mere deadline for filing suit. On the other hand, the statute of limitations appeared substantive in the *York* case because it would bar any such suit in state court. Accordingly, in a well-intentioned but similarly flawed attempt at clarification, we presented the outcome-determinative test: when the outcome of the litigation would vary depending on whether the federal court employed the federal provision or the state provision, that difference in outcome required the federal court to apply the state provision. The selection of one of the competing provisions in *York*—the state statute of limitations versus the equitable doctrine of laches—would determine the outcome of the litigation. Thus in *York*, following the outcome-determinative test, we applied the state statute of limitations. However, the shortcomings of the outcome-determinative test, like those of the substantive-procedural distinction, would quickly become apparent.

In *Byrd*, in which the issue was whether a judge or a jury should determine statutory employer status, we faced a South Carolina practice whereby judges (rather than juries) determined whether an entity was a statutory employer for purposes of the workers' compensation law. The conflicting state and federal provisions were this South Carolina practice versus the United States Constitution's Seventh Amendment right to jury trial, and the flaws of the previous tests were apparent. The substantive-procedural and outcome-determinative tests had been argued by both sides, with one side contending that having a judge versus a jury render the statutory employer determination was procedural with no difference in the outcome, and the other side contending that the difference in decisionmakers would have a substantive impact on the outcome of the litigation. Although we declined to overrule either the substantive-procedural or outcome-determinative tests, we observed that federal courts should balance the relevant federal and state interests in choosing between federal and state law, and in *Byrd*, the constitutional provision was an “affirmative countervailing consideration” outweighing any competing

---

\(^{19}\) See *York*, 326 U.S. at 108 ("Matters of 'substance' and matters of 'procedure' are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, 'substance' and 'procedure' are the same keywords to very different problems. Neither 'substance' nor 'procedure' represents the same invariants. Each implies different variables depending upon the particular problem for which it is used.").
state provision and requiring a jury determination in federal courts.\textsuperscript{20} \textit{Erie}, \textit{York}, and \textit{Byrd} were all Rules of Decision Act cases; our breakthrough case distinguishing between Rules of Decision Act cases and Rules Enabling Act cases came shortly after \textit{Byrd}—in \textit{Hanna} \textit{v. Plumer}.\textsuperscript{21}

B.

By the time we issued our decision in \textit{Hanna} \textit{v. Plumer},\textsuperscript{22} our Rules of Decision Act decisions had become thoroughly conflated with our Rules Enabling Act decisions to form a single \textit{Erie} approach,\textsuperscript{23} thereby creating massive confusion and elevating Rules of Decision Act concerns over the rights accorded by the Rules Enabling Act. Counsels' arguments in \textit{Hanna} exemplified this problem.

In \textit{Hanna}, the issue was whether service of process that was properly effected pursuant to Rule 4 of the Federal Rules of Civil Procedure was nevertheless insufficient due to a Massachusetts state law requiring in-hand personal service to an executor or administrator, rather than the substituted service that had been employed. The method for effecting service of process sounds eminently procedural. However, the party challenging the validity of the Rule 4 service offered a facially appealing but misguided argument: that \textit{Guaranty Trust Co. v. York's}\textsuperscript{24} outcome-determinative test mandated the use of the state provision because if the state provision was required, the time for effecting service had expired and thus the suit was time barred. In contrast, if the service pursuant to Rule 4 was sufficient, the suit could proceed in federal court. Thus, the choice between Rule 4 service versus state law service potentially would determine the outcome of the case because if the state provision applied, the defendant would win. Similarly, the argument continued, the underlying policies of \textit{Erie} required the federal court to apply the state service provision because \textit{Erie} was intended to assure that the outcome of a state law claim would remain the same regardless of whether that claim was filed in a state court or a federal court. Had the plaintiff filed suit in state court, the state court would have dismissed the action as time-

\textsuperscript{20} \textit{Byrd} also set out the "bound up" concept, which is discussed \textit{infra} note 41.
\textsuperscript{22} 380 U.S. 460 (1965).
\textsuperscript{23} See John Hart Ely, \textit{The Irrepressible Myth of Erie}, 87 HARV. L. REV. 693, 697-98 (1974) ("[T]he indiscriminate admixture of all questions respecting choices between federal and state law in diversity cases, under the single rubric of 'the \textit{Erie} doctrine' or 'the \textit{Erie} problem,' has served to make a major mystery out of what are really three distinct and rather ordinary problems of statutory and constitutional interpretation [based on the Constitution, the Rules of Decision Act, and the Rules Enabling Act]."); see also id. at 698 (noting the "widespread acceptance . . . of \textit{Erie} as a monolithic doctrine").
\textsuperscript{24} 326 U.S. 99 (1945).
barred, so permitting the suit to proceed in federal court would circumvent Erie's ultimate purpose.

Hanna presented an opportunity for clarification. In particular, we clarified the core concept set out at the beginning of this concurrence: that the Erie doctrine honors both the Rules of Decision Act and the Rules Enabling Act.²⁵ Erie, York, and Byrd v. Blue Ridge Electric Cooperative²⁶ concerned the Rules of Decision Act—what might be considered "traditional" Erie; none of those cases presented any Rules Enabling Act issue. However, Hanna and three prior cases—Mississippi Publishing Corp. v. Murphree,²⁷ Sibbach v. Wilson & Co.,²⁸ and Ragan v. Merchants' Transfer & Warehouse Co.²⁹—were Rules Enabling Act cases.³⁰ The analyses for Rules of Decision Act cases and Rules Enabling Act cases are not the same, were never intended to be the same, and should not be the same.³¹

The Rules of Decision Act and the Rules Enabling Act are both federal statutes; Congress did not subordinate the Rules Enabling Act to the Rules of Decision Act. Indeed, the Rules of Decision Act was already in existence³² when Congress passed the Rules Enabling Act,³³ and the Rules Enabling Act states that "[a]ll laws in conflict

²⁵. See Ely, supra note 23, at 699 ("For whatever Hanna's other merits or demerits, the major point of the Court's opinion was its separation for purposes of analysis of the Rules of Decision Act, the Enabling Act, and the constitutional demands to which the Erie opinion had alluded."). Despite the mention of the Constitution, Hanna does not accord the Constitution any balance in Rules Enabling Act cases. See Hanna, 380 U.S. at 471-72; see also Ely, supra note 23, at 706 ("The Hanna majority...[brought] the Constitution into its discussion,.... only to usher it back out again—to demonstrate that its function in 'Erie contexts' is no different from its function respecting other issues of federal power, and thereby attempt to restore it to its rightful place of functional irrelevance in cases covered by the Rules of Decision and Rules Enabling Acts.").


²⁸. 312 U.S. 1 (1941).

²⁹. 337 U.S. 530 (1949).


³¹. See Hanna, 380 U.S. at 470-71, stating: [I]n cases adjudicating the validity of Federal Rules, we have not applied the York rule or other refinements of Erie, but have to this day continued to decide questions concerning the scope of the Enabling Act and the constitutionality of specific Federal Rules in light of the distinction set forth in Sibbach [citation omitted]. [¶] Nor has the development of two separate lines of cases been inadvertent.... It is true that both the Enabling Act and the Erie rule say, roughly, that federal courts are to apply state "substantive" law and federal "procedural" law, but from that it need not follow that the tests are identical. For they were designed to control very different sorts of decisions.


with" rules promulgated pursuant to the Rules Enabling Act “shall be of no further force or effect.”34 The only limitation Congress imposed on the Rules Enabling Act was that the federal rules “not abridge, enlarge or modify any substantive right”35—language we have interpreted to mean that the rules authorized were to be procedural rules, not substantive ones.36

In 1965, at the time of our Hanna decision, we had the benefit of more than two decades of examples of the pitfalls of attempted classifications in our Erie decisions. Specifically, we had seen that “substantive” and “procedural” did not represent a dichotomy, but instead were situated along a continuum and thus had the potential to overlap. We had also seen the expansive reach of the outcome-determinative test, whereby many procedures had the potential to determine a case’s outcome.37 These realities render procedure particularly vulnerable to invalidation under the substantive-procedural and outcome-determinative tests due to procedure’s ability to have a substantive impact. Thus, to import the substantive-procedural and outcome-determinative tests into Rules Enabling Act analysis would emasculate the Rules Enabling Act38 and would unjustifiably elevate the Rules of Decision Act above the Rules Enabling Act. To honor both


34. 28 U.S.C. § 2072 (2006); see Ely, supra note 23, at 718 (noting that even absent this language in the Rules Enabling Act, “the Enabling Act is much more recent; it is specifically designed to control the validity of the Rules; and it contains language directed to the same general concern—protection of the prerogatives of state law—as the Rules of Decision Act. It indicates it is the only statutory test of a Federal Rule, and there is every reason to believe it means it.”).


36. See Stibbach, 312 U.S. at 4 (“The test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.”); see also Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 5 (1987) (observing that Federal Rules that “incidentally affect litigants’ substantive rights do not violate [the Rules Enabling Act] if reasonably necessary to maintain the integrity of that system of rules.”); accord Bus. Guides, Inc. v. Chromatic Commc’n Enters., Inc., 498 U.S. 533, 552 (1991) (upholding Rule 11 against a Rules Enabling Act challenge, stating that “any effect [by Rule 11] on substantive rights is incidental”); Murphyree, 326 U.S. at 445 (“Congress’ prohibition of any alteration of substantive rights of litigants was obviously not addressed to... incidental effects...”).

37. See Hanna, 380 U.S. at 468 (“The difference between the conclusion that the Massachusetts rule is applicable, and the conclusion that it is not, is of course at this point ‘outcome-determinative’ in the sense that if we hold the state rule to apply, respondent prevails, whereas if we hold that Rule 4(d)(1) governs, the litigation will continue. But in this sense every procedural variation is ‘outcome-determinative.’”).

38. See id. at 473-74 (“To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to dis-
statutes requires a common-sense focus on the principle that federal courts hearing a state law claim follow state substantive law and federal procedural law. And that was precisely our focus in *Hanna*.

Pursuant to *Hanna*, when the competing federal provision is a Federal Rule of Civil Procedure (or Federal Rule of Appellate Procedure, or Federal Rule of Evidence), the Federal Rule controls so long as it was properly promulgated pursuant to the Rules Enabling Act. When the conflicting federal provision is not a Federal Rule, but, for example, is instead a federal practice or a federal statute, then our *Hanna* analysis does not apply because the Rules Enabling Act is not implicated. And correspondingly, when the conflicting federal provision is a Federal Rule, *Hanna*’s Rules Enabling Act analysis applies, but the analysis in *Erie, York,* and *Byrd* does not apply because the Rules of Decision Act is not implicated. Thus, concepts of outcome-determination and “bound up” have no application in *Hanna* Rules Enabling Act analysis. In a sense, the *Hanna*/Rules Enabling Act analysis provides an analytical shortcut—one used only when the conflicting federal provision is a Federal Rule.

C.

As the plurality opinion observes, “we have rejected every statutory challenge to a Federal Rule that has come before us.” We re-

---

39. See *Woods*, 480 U.S. at 5 n.3 (explaining that *Hanna*’s “analytical framework provides the test for the validity of Federal Rules of Appellate Procedure as well, since these Rules were also prescribed pursuant to the Rules Enabling Act.”).

40. As explained previously, applying the outcome-determinative test to the Federal Rules would regularly lead to conclusions that a Federal Rule would determine the outcome in a given instance and thus would undermine the ability of federal courts to implement their own procedures as authorized by the Rules Enabling Act. See supra notes 37-38 and accompanying text.

41. In *Byrd*, we articulated the “bound up” concept, involving situations where a state rule integrates both substantive and procedural components. See *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 536 (1958) (concluding that the South Carolina practice at issue was “not a rule intended to be bound up with the definition of the rights and obligations of the parties”). The bound up concept has potential utility in Rules of Decision Act cases to clarify that state substantive provisions can be found within laws that also contain procedural components. However, the bound up concept has no applicability in the context of Rules Enabling Act cases because the integration of substantive and procedural components within a state law is simply irrelevant in that context. Suppose, for example, that a state law addresses the procedures for filing a complaint but also includes a substantive provision pertaining to the need in medical malpractice cases to append an affidavit from a physician in the same specialty verifying good cause for the lawsuit. The presence of this substantive provision changes nothing in the Rules Enabling Act analysis: Rule 8 continues to govern the complaint’s filing; it is not displaced by the state provision.


If a Federal Rule was properly promulgated pursuant to the Rules Enabling Act, we follow the Rule. *Sibbach, Woods,* and *Business Guides* supplement *Hanna* in supporting this approach. *Sibbach* was a personal injury action filed in federal court on the basis of diversity. Pursuant to Rules 35 and 37, the defendant moved for a court-ordered physical examination to provide an assessment of the plaintiff’s alleged injuries.[^51] The plaintiff argued the court order was void because the Illinois state courts would not have permitted such an examination. We upheld the application of the Federal Rules.

The *Sibbach* plaintiff admitted that Rules 35 and 37 governed procedure,[^52] but “insist[ed], nevertheless, that by the [Rules Enabling Act’s] prohibition against abridging substantive rights, Congress has banned the rules here challenged.”[^53] The plaintiff did not specifically argue that Rules 35 and 37 had a substantive impact, but instead contended that the Federal Rules affected the “important” or “substantial” right to freedom from invasion of the person.[^54] Today, one might see a similar plaintiff argue that the Federal Rules had a potentially substantive impact by virtue of the significance of medical testimony.

[^45]: 312 U.S. 1 (1941).
[^51]: *Sibbach*, 312 U.S. at 2.
[^52]: Id. at 3.
[^53]: Id.
[^54]: Id.
in personal injury actions, but the same ultimate disposition would result. In *Sibbach*, rejecting the plaintiff's challenge, we stated: "The test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them. That the rules in question are such is admitted."55

In *Woods*, a jury awarded the plaintiffs more than $300,000 for personal injuries resulting from a motorcycle accident, and the appellate court affirmed the judgment.56 The suit was tried in an Alabama federal court on the basis of diversity jurisdiction. The plaintiffs subsequently moved the federal court to impose Alabama's ten percent mandatory affirmance penalty, created by the Alabama Legislature "to penalize frivolous appeals and appeals interposed for delay, . . . and to provide 'additional damages' as compensation to the appellees for having to suffer the ordeal of defending the judgments on appeal."57 The defendant asserted that Federal Rule of Appellate Procedure 38 instead governed the matter. Pursuant to Rule 38, "If the courts of appeals shall determine that an award is frivolous, it may award just damages and single or double costs to the appellee."58 We concluded that Rule 38 applied.

Rule 38 affords a court of appeals plenary discretion to assess "just damages" in order to penalize an appellant who takes a frivolous appeal and to compensate the injured appellee for the delay and added expense of defending the district court's judgment. Thus, the Rule's discretionary mode of operation unmistakably conflicts with the mandatory provision of Alabama's affirmance penalty statute.59

In *Business Guides*, a plaintiff challenged the imposition of Rule 11 sanctions, arguing that the Rule violated the Rules Enabling Act because it constituted an improper fee shifting statute and created a federal common law of malicious prosecution inconsistent with state law.60 We rejected both arguments, noting that Rule 11 sanctions are neither tied to the litigation's outcome nor shift the entire cost of litigation, and also noting that the Rule's purpose "is not to reward parties who are victimized by litigation; it is to deter baseless filings and curb abuses."61 Our discussion specifically noted the power of the promulgation process:

55.  *Id.* at 4.
57.  *Id.* at 5.
58.  *Id.*
59.  *Id.*
61.  *Id.*
We begin by noting that any Rules Enabling Act challenge to Rule 11 has a large hurdle to get over. The Federal Rules of Civil Procedure are not enacted by Congress, but “Congress participates in the rulemaking process.” Additionally, the Rules do not go into effect until Congress has had at least seven months to look them over. A challenge to Rule 11 can therefore succeed “only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule . . . transgresses neither the terms of the Enabling Act nor constitutional restrictions.”

We have, however, decided two cases in which we actually were able, due to the distinctive nature of the issue, to follow both the Federal Rule and the purportedly conflicting state provision. *Ragan* and *Walker* both presented a purported conflict between Rule 3 and a state statute of limitations. The applicable state statute of limitations (Kansas in *Ragan*, Oklahoma in *Walker*) provided that the statute of limitations was not tolled until service of the summons; the plaintiffs in both cases argued that the filing of the complaint tolled the statute pursuant to Rule 3. Rule 3 consists of a single sentence: “A civil action is commenced by filing a complaint with the court.” This unremarkable provision states simply that one begins a lawsuit in federal court by filing a complaint; the rule says nothing about statutes of limitations or the tolling of limitations periods. Accordingly, Rule 3 and the state statutes of limitations did not present a “direct collision” situation—they could peacefully coexist; both could be honored. The lawsuits were instituted by filing a complaint in the appropriate federal court in accordance with Rule 3, and the determination as to whether the suits were time-barred could be conducted in accordance with the state statutes of limitations. Thus, *Ragan* and *Walker* are a species of the Hanna/Rules Enabling Act: because Rule 3 was properly promulgated, it must be followed, but if the Federal Rule and the purportedly conflicting state provision do not actually conflict—if they can peacefully coexist; if both can be honored—then we follow both.

D.

Not everyone has been satisfied with our approach to the Rules Enabling Act. Professor Ely, for example, in perhaps the best known *Erie* article in the legal literature, described our approach as “hard-hearted” and “not seem[ing] even remotely to capture *Erie’s* true

62. *Id.* at 552 (citations omitted).
65. *See Hanna*, 380 U.S. at 472 (using the term “direct collision”).
meaning.” The bone of contention appears to be the result of pairing § 2072(b)’s admonition that rules enacted pursuant to the Rules Enabling Act “shall not abridge, enlarge or modify any substantive right,” with Guaranty Trust Co. v. York’s summary of Erie’s purpose:

In essence, the intent of [Erie] was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.

However, those who tenaciously insist upon grafting the outcome-determinative test onto Rules Enabling Act analysis are missing the mark in several respects.

First, importing the outcome-determinative test into the Rules Enabling Act is directly contrary to Hanna v. Plumer’s characterization of the “assumption that the rule of Erie . . . constitutes the appropriate test of the validity and therefore the applicability of a Federal Rule of Civil Procedure” as “flaw[ed]” and “incorrect.” Indeed, Hanna expressly rejected the use of the outcome-determinative test in Rules Enabling Act analysis, stating that “in cases adjudicating the validity of Federal Rules, we have not applied the York rule or other refinements of Erie.”

Second, because “every procedural variation [has the potential to be] ‘outcome-determinative,’” employing a Rules of Decision Act analysis in interpreting the Rules Enabling Act would regularly subject the Federal Rules to being dishonored, thus undermining the very purpose of the Rules Enabling Act generally and the Federal Rules of Civil Procedure specifically. The Federal Rules of Civil Procedure, after all, were intended to provide consistent, transsubstan-

66. See Ely, supra note 23, at 697.
71. Hanna, 380 U.S. at 470.
72. Id. at 468.
73. See Ely, supra note 23, at 721-22 (“The Rules are replete . . . with provisions whose implementation in lieu of state law can be outcome determinative even in Hanna’s refined sense. To take just two examples, the provisions for discovery of an opponent’s case in advance of trial and those that ensure the liberal construction and amendment of pleadings have doubtless often meant the difference between winning and losing a lawsuit. Thus, were they not part of the Rules, the Rules of Decision Act would require federal courts to follow state practice. To import the Rules of Decision Act’s standard into the Enabling Act would therefore be to invalidate not only those provisions, which are obviously central to the Rules’ design, but many others as well.
tive, uniform rules for the federal courts—a goal that is undermined if the applicability of a Federal Rule varies from state to state.

In sum, when the conflicting federal provision is a Federal Rule of Civil Procedure (or other Federal Rule), a separate strand of Erie analysis applies— one rooted in the Rules Enabling Act rather than the Rules of Decision Act. Our prior decisions have explained that we examine whether such a Federal Rule directly collides with the purportedly conflicting state provision: if the Federal Rule and the state provision can peacefully coexist, then we honor both—there is no need to select one over the other and no need for further analysis. If, however, the Federal Rule and the state provision cannot peacefully coexist, then the federal courts must follow the Federal Rule. Note that in either situation, we follow the Federal Rule. The only question is whether we additionally follow the state provision.

II.

Just as we previously have explained that the Federal Rule governs, so too we have indicated, admittedly less directly, that examining for substantive impact pursuant to subsection (b) of the Rules Enabling Act comes at one specific point in time: the time of the Federal Rule's promulgation. The time of the Federal Rule's promulgation is consistent with the Rules Enabling Act's language, which can be read as imposing the duty to ensure that the Federal Rule does not "abridge, enlarge or modify any substantive right" as part of the process of "prescrib[ing]" the rule. Other potential times for evaluating a Federal Rule for compliance with the Rules Enabling Act, including the time of filing the complaint, or the time that the potential conflict between a Federal Rule and a state provision was or reasonably should have been discovered, encourage challenges to the Federal Rules, meaning the Federal Rules would always be at risk and would be subject to being overridden by subsequent state law changes. Moreover, post-promulgation evaluation tends to encourage post hoc arguments of the outcome-determinative variety, thus inadvertently promoting the erroneous use of the outcome-determinative test in Rules Enabling Act analysis as well as unnecessarily wasting court resources.

The time of promulgation vantage point avoids the context-specific scrutiny that can lead to the arguments proffered in Hanna v. Plumer—the "procedural-rule-but-its-application-has-a-substantive-impact-under-these-particular-circumstances" offshoot of the substan-

75. See Perschbacher & Basset, supra note 33, at 284, 292.
tive-procedural test and the related “procedural-rule-but-it-leads-to-a
different-outcome-than-the-state-provision-under-these-particular-
circumstances” offshoot of the outcome-determinative test. The pro-
mulgation vantage point approach honors both the Rules of Decision
Act and the Rules Enabling Act by requiring that the Federal Rule is
indeed a procedural rule rather than one attempting to regulate sub-
stance law. But, in particular, the promulgation vantage point de-
clines to undertake the kind of case-by-case scrutiny that invites
fishing for ways to undermine the Rules Enabling Act by searching for
a substantive impact. If the Federal Rule was properly promulgated
when promulgated, we follow the rule.

Freezing analysis at one particular point in time is common to
procedural considerations: for example, we determine the existence of
diversity jurisdiction at the time the complaint is filed without regard
to subsequent changes in citizenship; in jurisdictions following the
first-served defendant rule, the ability to remove a lawsuit from state
court to federal court is determined by whether the first-served defen-
dant removed the action within thirty days of service, without regard
to when other defendants were served. Using one specific vantage
point yields consistency and clarity, eliminating the need for ongoing
reexamination. For example, determining diversity at the time of fil-
ing provides a clear rule, uniformly applied, and prevents both the ex-
penditure of court resources and the potential change of courthouses
that would result from an ability to continually reexamine the parties’
citizenships throughout the litigation. Similarly, examining the Fed-
eral Rule for compliance with the Rules Enabling Act from the van-
tage point of the time of promulgation provides a clear rule with
uniform application and prevents the expenditure of court resources
inherent in permitting ongoing reexaminations for potential substan-
tive impact.

The benefit of examining Federal Rules for compliance with the
Rules Enabling Act at the time of the Rule’s promulgation becomes
apparent when we return to our earlier Rules Enabling Act decisions.
Armco Steel Corp.*, our focus was on whether there was an unavoida-
ble conflict between the federal and state provisions—i.e., whether the

79. If the action originally was filed in state court, diversity additionally must exist
1986).
81. 337 U.S. 530 (1949).
82. 446 U.S. 740 (1980).
federal and state provisions could peacefully coexist. 83 We concluded that such peaceful coexistence was possible in Ragan and Walker, so both the Federal Rule and the state provision could be honored. Lacking any direct collision between the federal and state provisions, no need arose to consider whether the Federal Rule complied with the Rules Enabling Act, so a promulgation approach was unnecessary. However, the promulgation approach is very helpful in cases where (1) the federal and state provisions cannot peacefully coexist, and (2) choosing between the federal and state provisions will have an impact on the outcome of the case. Although Ragan and Walker had no need for the promulgation approach because both the Federal Rule and the state provision could be honored, Hanna, Sibbach v. Wilson & Co., 84 Burlington Northern Railway Co. v. Woods, 85 and Business Guides, Inc. v. Chromatic Communications Enterprises, Inc. 86 illustrate the application of the promulgation approach. 87

Turning first to Hanna, we concluded that Federal Rule of Civil Procedure 4 was “valid and controlling.”88 Although we have never explicitly adopted the promulgation approach, in reading our decision, Hanna contains language that supports the promulgation vantage point. In particular, we stated in Hanna:

When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided Erie choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions. 89

84. 312 U.S. 1 (1941).
88. Hanna, 380 U.S. at 474.
89. Id. at 471; see also Woods, 480 U.S. at 5 ("[T]he study and approval given each proposed Rule by the Advisory Committee, the Judicial Conference, and this Court, and the statutory requirement that the Rule be reported to Congress for a period of review before taking effect, . . . give the Rules presumptive validity under both the constitutional and statutory constraints."). We reaffirmed the significance of this point more recently in Business Guides, in which we observed, in the context of a Rules Enabling Act challenge to Rule 11:

We begin by noting that any Rules Enabling Act challenge to [a Federal Rule] has a large hurdle to get over. The Federal Rules of Civil Procedure are not enacted by Congress, but Congress participates in the rulemaking process. Additionally, the Rules do not go into effect until Congress has had at least seven
As our language suggests, it is the moment of promulgation—the time immediately preceding adoption—when the Advisory Committee, this Court, and Congress consider whether the Rule conforms with the terms of the Rules Enabling Act, i.e. that the Rule regulates procedure and does not violate the prohibition within the Act. 90

Shifting the analysis of the validity of a Federal Rule to the time of its promulgation is consistent with Hanna's rationale and conclusion, and eliminates the temptation to inject traditional Erie concepts into the analysis—a desirable consequence in light of Hanna's repeated admonitions that traditional Erie concepts are inapplicable to Rules Enabling Act cases. 91 Another desirable consequence of the promulgation approach—one of particular significance in the matter currently before this Court—is that subsequent state legislation becomes irrelevant. If the Federal Rule was properly promulgated, later state legislative enactments have no bearing on the validity of the Federal Rule. And this, it seems to me, is as it should be. If a Federal Rule was properly promulgated, it should not face potential invalidation due to the ebbs and flows of the legislative actions of the fifty different states.

Sibbach similarly benefits from a promulgation vantage point—perhaps even more so, due to Sibbach's prominent critics. 92 In Sib-
enabling the federal rules

bach, we upheld Federal Rules of Civil Procedure 35 and 37 as "within the authority granted."93 In Sibbach, as in Hanna, we used language supporting the promulgation approach:

[In accordance with the [Rules Enabling Act], the rules were submitted to the Congress so that that body might examine them and veto their going into effect if contrary to the policy of the legislature. [¶] The value of the reservation of the power to examine proposed rules, laws and regulations before they become effective is well understood by Congress. It is frequently, as here, employed to make sure that the action under the delegation squares with the Congressional purpose. Evidently the Congress felt the rule was within the ambit of the statute as no effort was made to eliminate it from the proposed body of rules, although this specific rule was attacked and defended before the committees of the two Houses. . . . That no adverse action was taken by Congress indicates, at least, that no transgression of legislative policy was found.94

Using the promulgation approach in Sibbach again is consistent with the decision's rationale and conclusion, and offers substantial benefits. In addition to rendering unnecessary Sibbach's discussion regarding Illinois law (which did not permit physical examinations) versus Indiana law (which permitted such examinations)95—as well as the discussion regarding the division more generally in the state courts regarding such physical examinations and the practices in Canada and England96—the promulgation approach eliminates potential game-playing. In Sibbach, the plaintiff chose to file her complaint in federal court,97 yet then attempted to evade Rules 35 and 37, arguing that she could not be compelled to submit to a physical examination to determine the nature and extent of her injuries.98

Woods also involved directly conflicting federal and state provisions where the provision selected would have an impact on the outcome of the case. Federal Rule of Appellate Procedure 38 permitted, but did not require, federal appellate courts to award damages and

93. Sibbach, 312 U.S. at 16.
94. Id. at 14-16.
95. Id. at 10-11. As we subsequently noted in Hanna: Sibbach was decided before Klaxon Co. v. Stentor Electric Mfg. Co., . . . and the Sibbach opinion makes clear that the Court was proceeding on the assumption that if the law of any State was relevant, it was the law of the State where the tort occurred (Indiana), which, like Rule 35, made provision for such [physical examination] orders.
96. Sibbach, 312 U.S. at 13-14.
97. Id. at 6.
98. Id. at 6-7.
costs in frivolous appeals, whereas Alabama state law mandated a ten percent affirmance penalty. The mandatory versus discretionary nature of the two provisions yielded a direct collision, and the choice of provision would have a potential impact on the outcome of the case in terms of the amount the plaintiff would receive. If the court applied the Alabama provision, the plaintiff was automatically entitled to an additional $30,500; if the court applied the Federal Rule, the plaintiff was not entitled to any specific additional amount, and potentially might receive no additional award. In upholding Rule 38, we again emphasized "the study and approval given each proposed Rule by the Advisory Committee, the Judicial Conference, and this Court, and the statutory requirement that the Rule be reported to Congress for a period of review before taking effect." Applying the promulgation approach in Woods clarifies that so long as the Federal Rule was properly promulgated, a state legislature's choice to enact a different, conflicting law is irrelevant to the examination and analysis.

_Business Guides_ has the benefit of being a more recent decision and of compellingly illustrating the utility of the promulgation vantage point. After finding no factual basis for the plaintiff's copyright infringement action, the federal district court imposed Rule 11 sanctions against both the plaintiff and plaintiff's counsel. On appeal, the plaintiff argued, among other things, that Rule 11 sanctions violated the Rules Enabling Act because Rule 11 "authorized fee shifting in a manner not approved by Congress" and "effectively create[d] a federal tort of malicious prosecution, thereby encroaching upon various state law causes of action." In _Business Guides_, we again noted the multi-level evaluative and approvals process for Federal Rules and again observed that incidental effects on litigants' substantive rights do not violate the Rules Enabling Act. Although the majority had no difficulty upholding Rule 11, the plaintiff's invocation of fee shifting statutes and conflicts with state laws regarding malicious prosecution illustrate the benefit of the promulgation approach—and the risk, without a promulgation approach, of inviting arguments to potentially invalidate any Federal Rule whenever some state law touches on the same area. The promulgation approach honors the underlying purpose of the Federal Rules of Civil Procedure in creating one uniform set of procedural rules for use in every federal district court nationwide, rather than having federal procedural rules that vary from state to state—and avoids the potential for giving short shrift to the Rules

99. See supra notes 56-59 and accompanying text.
100. _Woods_, 480 U.S. at 6.
102. _Id._ at 552.

In sum, the promulgation vantage point honors the Rules of Decision Act by requiring federal courts to apply state substantive law to state law based claims, and by restricting Federal Rules to procedural, not substantive, matters. The promulgation approach honors the Rules Enabling Act by upholding Federal Rules that were properly promulgated so long as they were, in fact, properly promulgated—which encompasses not only having obtained the necessary approvals but also that the Advisory Committee, the Judicial Conference, this Court, and Congress, by not exercising its veto, judged that the Rule’s content was procedural and not substantive. However, the promulgation approach declines to accord the Rules of Decision Act a status superior to the Rules Enabling Act, which would permit ongoing opportunities to undermine the Federal Rules. The promulgation approach similarly declines to accord the Rules Enabling Act with a status superior to the Rules of Decision Act, which would turn a blind eye to the content of a provision so long as it carried a Federal Rule label. Instead, the promulgation approach accords the Rules of Decision Act and the Rules Enabling Act equal dignity, requiring Federal Rules to be truly procedural in nature, but conducting that examination at the time of promulgation.

Accordingly, the inquiry is, was the Federal Rule promulgated in compliance with the Rules Enabling Act? The inquiry is not whether some state provision—whether already existing or yet to be created—does or could conflict with the Federal Rule; indeed such an approach would turn the Rules Enabling Act on its head by potentially invalidating any Federal Rule when a state law touches on the same area as that Federal Rule. The focus is whether the Federal Rule is procedural in nature: This is what our decisions have meant when we have said that the Federal Rule must “really regulate procedure.”103 If the Federal Rule is procedural in nature, the Rules Enabling Act authorizes its promulgation, subject to the requisite approvals—but not subject to second-guessing of the Monday morning quarterback variety when it comes into potential conflict with state laws or practices.104 With this background, I now turn to the matter before us.

103. Sibbach, 312 U.S. at 4.
104. See WEBSTER’S NEW WORLD COLLEGE DICT. 929 (4th ed. 2002) (defining “Monday morning quarterback” as “a person who, after the event, offers advice or criticism concerning decisions made by others . . . .”).
III.

Federal Rule of Civil Procedure 23 would permit this lawsuit to proceed as a class action. A New York statute, section 901, closely resembles Rule 23—except that its subsection (b) generally prohibits a class action to recover a penalty. The plurality has concluded that Rule 23 controls; the dissent has concluded that Rule 23 and section 901 do not "directly collide" so both can be honored. The plurality's conclusion is correct.

A.

The two provisions at issue in this case are a state statute and a Federal Rule of Civil Procedure. Because the federal provision is a Federal Rule, our analysis must follow the separate strand of Erie analysis that is rooted in the Rules Enabling Act. The next question is whether we can honor both Rule 23 and section 901, and on this point I side with the plurality: If Rule 23 applies, the class action may proceed, whereas if section 901 applies, the class action may not proceed. In this respect, this situation thus is reminiscent of Hanna v. Plumer, whereby the choice between the federal and state provisions will determine whether the lawsuit proceeds or is dismissed. This, to my mind, reflects a direct collision between the two provisions.

The dissent expends substantial effort in providing "[t]he story behind [section] 901's enactment," despite this Court's admonitions regarding the potential unreliability of legislative history. Indeed, the dissent itself notes that "the final bill . . . was the result of . . . compromise." The background of section 901 is potentially unreliable and is unnecessary to the analysis in any event. The dissent goes further astray in its attempt to find no direct conflict between section 901 and Rule 23. The dissent's analytical flaws in this latter regard are twofold: First, the dissent adopts an approach to the Rules Enabling Act that invites ongoing reexaminations—the very approach I rejected above. The dissent opines that the federal courts should "interpre[t] the Federal Rules . . . with sensitivity to important state interests" and with an effort "to avoid conflict with important state regulatory policies," and rejects the Court's conclusion in this case as "a mechanical reading of [the] Federal Rules."

The dissent's open-ended approach goes too far, according so much deference to state provisions as to undermine both the Rule in

105. N.Y. C.P.L.R. 901(b) (McKinney 2010).
106. See Hanna v. Plumer, 380 U.S. 460, 472 (1965) (using the term "direct collision").
question and the Rules Enabling Act. Hanna set the basic parameters for the Rules Enabling Act inquiry—parameters that are consistent with the promulgation vantage point, but that the dissent appears to overlook. Hanna “conclude[d] that the adoption of Rule 4(d)(1), designed to control service of process in diversity actions, neither exceeded the congressional mandate embodied in the Rules Enabling Act nor transgressed constitutional bounds, and that the Rule is therefore the standard against which the District Court should have measured the adequacy of the service.”108 Later in the Hanna opinion, we rejected as “invalid” the “suggestion that the Erie doctrine acts as a check on the Federal Rules of Civil Procedure” that would require the application of the Massachusetts rule because the difference in the service requirements would affect the case’s outcome.109 The dissent mistakenly takes this “invalid” path and attempts to use the Erie doctrine as just such a check on the Federal Rules. The dissent’s approach unnecessarily subordinates the Rules Enabling Act to the Rules of Decision Act and invites an inconsistent application of rules whose very purpose was to bring uniformity and consistency to federal court procedure.110

Second, the dissent engages in a false distinction in its stretch to avoid finding a direct conflict, asserting that “Rule 23 describes a method of enforcing a claim for relief, while [section] 901(b) defines the dimensions of the claim itself.” The dissent’s failure in its valiant attempt to distinguish the two provisions is amply illustrated by comparing the language in the two provisions. Section 901(a) is essentially identical to Rule 23; only in subsection (b) does the prohibition appear against class actions seeking to recover a penalty. Both provisions cover the same general parameters: the procedural prerequisites for maintaining a class action. The circumstances here are no different from a conflict between Rule 23 and any state’s class action rule; as a Federal Rule of Civil Procedure, Rule 23 applies so long as it satisfies the Rules Enabling Act.

Remaining is only the Rules Enabling Act inquiry: Is Rule 23 procedural in nature, and was it promulgated pursuant to the requisite approvals? The answer to both questions is yes. No one, at any stage of these proceedings, has attempted to argue that Rule 23 is facially substantive, nor has anyone contended that the promulgation of Rule 23 was obtained without securing the required approvals.

Accordingly, I concur in part and concur in the judgment.

108. Hanna, 380 U.S. at 463-64.
109. Id. at 466; see also Ely, supra note 23, at 698 (characterizing Hanna as establishing “that the Enabling Act constitutes the only check on the [Federal] Rules—that Erie does not stand there as a backstop”).
110. See Perschbacher & Bassett, supra note 33, at 284.